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Gender recognition and trans rights in the CJEU. A personal status recognition or a lost game?

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Abstract: The Mirin case, through the conclusions of the Advocate General, has given some thoughts on the steps we have seen so far in the recognition of personal status. It is an unacceptable status for some people, from the Member States of the Union, who still do not even want to hear, for the rights of trans. On the other hand we have obstacles for the free movement of people, the general refusal of this recognition, given that the right to a name, to a new gender is a reality today in a global society. People ask for the recognition of their personal rights but also their family status through justice to be protected. The jurisprudence, up to now, from a court super partes, has shown that there is the will for recognition in the sector but the

legislative gaps, both from the European Union to create a binding pole in this sector and from a national perspective, where some rights are not yet part of a status of democracy and values recognized for all citizens, who want to register their status in a civil registry, is a reality.

Keywords: gender rights; trans rights; ECHR; ECtHR; CJEU; European Union law; protection of human rights; free movement of persons; family status rights.

Introduction

The change in society, at a global level, in recent years, is a reality. As was normal, it has needed to acquire, also from a jurisprudential point of view, a basis of recognition especially for delicate topics such as the change of a gender to a Member State not of residence, or to a non-EU country, citizenship rights, etc.

Recently, we have the Mirin case C-4/23, of May 2024[1] from

1CJEU, C-4/23, Mirin, conclusions of the Advocate General il 7 May 2024, ECLI:EU:C:2024:385.

which it is worth reading and interpreting the conclusions of the Advocate General de la Tour. It is about a Romanian citizen who naturalized in Great Britain. In his birth certificate he is registered as female but he asked the Romanian authorities to change it and to have a male gender identity, which was acquired from Great Britain through a completely legal administrative procedure. It was about the change of name by deed poll where the issuing of the certificate by a committee was not the same thing for Romania. Here, it was needed, since it was about a change of civil status the relative change of gender by a judicial decision relating to civil status.

The applicant started judicial proceedings in Romania concerning the change of gender but without precise results so he turned to the European Court of Human Rights (ECtHR) with the relevant judgment of 19 January 2021 (Bob, 2021)[2].

In the first instance the judge refused the civil status service also creating two preliminary questions before the CJJEU. The refusal

2ECtHR, 19 January 2021, case nn. 2145/16 and 20607/16, X and Y v. Romania.

was based on the change of gender, which hindered the rights of European citizenship as well as the right to move and reside freely in the Union.

After Brexit, the argument was reported in a non clear way to the Court of Justice of the European Union regarding the birth certificate that was issued from the Great Britain considering that the official document of a Member State of the Union issued during the transition period should be applied to the territory of the United Kingdom as well as in the European territory given that the relative withdrawal was made after the relative purchase of the certificate.

The application of European regulations in the field of civil cooperation, with the exception of Regulation no. 2016/1191 on the simplification of requirements for the presentation of certain public documents in the European Union and those relating to the life and civil status of a person, are not applied. According to Art. 2, par. 4 of the Regulation is acceptable:

> "(...) the recognition in a Member State of the legal effects relating to the content of public documents issued by the authorities of another Member State (...)".

Of course, domestic legislation and especially the Member States of the Union take in first line the relative recognition of gender within the EU context. They are based on the indices entitled: "Justice and Consumers" of the European Commission, Legal Gender Recognition in the EU. The procedures for accessing the relative gender recognition are not clearly defined and this has as a consequence the creation of legal situations that exclude recognition on paper. Thus, the acceptance of the request for any type of intervention and medical assessment did not require medical forms but required an assessment of the gender change through a judicial procedure. Thus, it is considered sufficient that the individual formally requested to acquire a new status through a judicial procedure.

Already in two states like Bulgaria and Hungary legal gender recognition is already excluded. In Hungary in 2020 we saw an act that violated any type of recognition for transsexuals and

intersexuals (Holroyd, 2020). Additionally, the Court of Cassation in Bulgaria and the Constitutional Court have taken a position to close gaps and discussions by leaving it to the legislator and the constitution to structure rules regarding birth and death certificates for this type of people, who have changed gender. If this were not the case, gender recognition would lead to registration of marriages and families with homosexual parents (Petrova, 2023).

In any case, recognition should create and have effects within a Member State. In the event that the gender change occurs in a different Member State of the Union than the one of residence, the rules that already exist abroad, for the relative recognition of status acquired abroad, can be applied (Gössl, 2016).

On the opposite side of the subject under investigation, we have countries such as Sweden, Ireland and Portugal, which regulate in a precise way the recognition of the effects of gender change that has been acquired abroad and require compliance with conditions such as, for example, the legality of the procedure

according to the legal system, the change and the connection between the citizenship system, residence and the subject, who presents the request for recognition.

Case law from ECtHR and CJEU

Up to now, a careful search has not addressed the issue, and each decision in these matters deals with individual cases that belong to a specific group of categories.

The first group includes violations of the principle of non-discrimination against people who are transsexual and/or change their gender status. In this regard, people face discrimination in various and different aspects of life, especially in the workplace[3], in access to pension[4], to the old-age pension[5], and to their

3CJEU, sentence of 30 April 1996, case C-13/94, P v. S and Cornwall County Council, ECLI:EU:C:1996:170, I-02143.

4CJEU, sentence of 7 January 2004, case C-117/01, K.B., ECLI:EU:C:2004:7, I-00541.

5CJEU, sentence of 27 April 2006, case C-423/04, Richards, ECLI:EU:C:2006:256, I-03585.

marriage status (annulment of marriage) (Osella, 2021)[6].

The second group is part of the civil status issue. The Member States of the Union have the obligation to update the birth certificate of their citizens. In this way, the personal details acquired in another Member State are recognized and are linked to the exercise of free movement. In this case, refusing national authorities to hinder the movement of the individual is the result of the name change procedure that respects the principles of equivalence and effectiveness[7]. However, this is a group that is not so well recognized from a jurisprudential point of view.

The third group focuses on the recognition of family status that has been acquired abroad. This group includes the Coman case of 2018 (Kochenov, Belavusau, 2020)[8] and the Pancharevo case of

6CJEU, sentence of 26 June 2018, case C-451/16, MB, ECLI:EU:C:2018:492, published in the electronic Reports of the cases.

7CJEU, sentence of 8 June 2017, case C-541/15, Freitag, ECLI:EU:C:2017:432, published in the electronic Reports of the cases, parr. 41 and 42.

8CJEU, sentence of 5 June 2018, case C-673/16, ECLI:EU:C:2018:386,

2021[9]. The Advocate General in these judgments according to par. 38 stated that:

> "(...) any argument relating to the obligations in matters of civil status (...) as they concern only the administrative consequences that civil status documents drawn up in one Member State must produce in another Member State (...) address the possible justifications for an obstacle to movement arising from the failure to recognise the status acquired abroad, although (...) completely fails to address this aspect (...)".

We recall the case C-247/23, according to which an Iranian refugee who had residency in Hungary asked to be indicated the female birth sex that was registered in asylum matters, requesting compliance with Art. 16 GDPR on the right to rectification of his personal data that were inaccurate. However, the Mirin case is based on two different and parallel things, namely the recognition of gender change and the updating of civil status documents.

published in the electronic Reports of the cases.

9CJEU, sentence of the 14 December 2021, case C-490/20, Stolichna obshtina, rayon "Pancharevo", ECLI:EU:C:2021:1008, published in the electronic Reports of the cases.

The Bulgarian appellant, faced with the impossibility of acquiring legal recognition of gender change, referred to the European rules on equality for citizens of the Union, free movement, the prohibition of discrimination and effective judicial protection.

The law in Poland prevented the registration in the civil registry of the marriage certificate of persons of the same sex where they are legally married to another Member State of the Union. However, the European Court admitted that the certificates of status for free movement can be updated. To do so, the CJEU made use of some articles of the EU, such as Art. 20 and 21 TFEU, 7 and 21 CFREU (Blanke, Mangiamelli, 2021), and Directive 2004/38/EC[10].

10Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance). OJ L 158, 30.4.2004, p. 77-123.

National regulations and especially in the field of gender reassignment are possible and are usually based on the respect of the fundamental rights of individuals. The violation of such rights, on the other hand, has been an argument that has been addressed on numerous occasions by the ECtHR. The court, according to Art. 8 of the European Convention of Human Rights (ECHR), has taken a position in cases of personal development and physical and moral integrity of transsexual and gender change people (Gonzalez Salzberg, 2014; Dunne, 2015; Villiger, 2023)[11].

The lack of recognition of gender reassignment has had to do sometimes with violence[12]. In this case had to be addressed by national legislation and assessed on a case-by-case basis. There

11ECtHR, sentence of the 12 September 2003, case n. 35968/97, Van Kück v. Germany. Sentence of the 8 January 2009, case n. 29002/06, Schlumpf v. Switzerland. Sentence of 10 March 2015, case n. 14793/08, YY v. Turkey.

12ECtHR, sentence of 11 June 2002, case n. 28957/95, Christine Goodwin v. United Kingdom.

are, therefore, other cases in the ECtHR[13] regarding the lack of recognition of gender reassignment, the de facto change through a surgical operation (Gonzalez Salzberg, 2018)[14], as well as the ascertainment of the procedure that acquires the new gender but with a lack of clarity and precision, as we have seen with the case in Romania[15]. These are sensitive issues, so the rulings so far have shown that we need binding intervention from the European legislator.

Discussions and criticisms

In par. 61 of the Miron case the Advocate General has requested the recognition of a new first name for the new gender acquired. According to him, the refusal to recognize the name that was acquired in a different state is part and constitutes, in our case in Romania, a restriction on freedom of movement, according to

13ECtHR, sentence of 11 October 2018, case n. 55216/08, S.V. v. Italy.

14ECtHR, sentence of 6 April 2017, case nn. 79885/12, 52471/13 and 52596/13, A.P., Garçon and Nicot v. France.

15ECtHR, sentence X and Y v. Romania, op. cit.

Art. 21 TFEU (Blanke, Mangiamelli, 2021). The Advocate General continuous stating that:

> "(…) he could not invoke justifications relating to public policy or equal treatment to refuse the change of first name (…) this article precludes a Member State from refusing to enter in a civil status register a first name acquired in another Member State following a change of sex (…)"[16].

This is an interpretative basis that is not too binding but general in nature based on the free circulation principle and not with the recognition of the name and gender. Even the justification of public order is not a convincing argument for the refusal to change a name purchased abroad.

Indeed, there are two arguments, that are connected to each other and the consideration of the rules of the Member States are not consistent in the matter of civil status and the indication and the difference between the registration of a female and male name. The name must respond to one's sex.

16CJEU, 4/23, Miron, op. cit., parr. 60 and 64.

The Advocate General based himself in the fact that in Poland there is no precise rule that distinguishes between name and gender and the relevant civil code does not prohibit a registration of names that lead to laughter and/or have an ambiguous meaning but cannot harm public order and the interest especially of a child. The registration of a male, female is not a reason for denial as we have also seen from the Bulgarian case, that is not connected with the nature of a person.

The Advocate General, in the Bogendorff case[17], in relation to the change of the appellant's surname and name, decided in par. 83 that:

> "(...) objective reason that could have abstractly justified the refusal to recognize the change of surname could not instead be applied to the refusal to recognize the change of first name (...)".

Thus, the Court did not establish, in a binding manner, an obligation of recognition for changes of name acquired abroad,

17CJEU, sentence of 2 June 2016, case C-438/14, Bogendorff von Wolffersdorff, ECLI:EU:C:2016:401, published in the electronic Reports of the cases.

and why not also in its own territory, where the argument in the case in question was connected with the principle of equality for German citizens to apply not entirely imprecise references to the surname and name. The Court did not find justification in relation to the recognition of the change of name, taking for granted the position of a legal system that refuses the feminine name to the masculine gender and vice versa. Thus, the recognition of the name and gender poses different problems in the matter and causes different results.

Civil status relations with family members

We continue with the positions of the Advocate General in the Mirin case and especially with par. 21 TFEU, with which he referred to the matter of name that applies and that indicates the sex in the birth certificate as a response that affirms and that concludes the refusal of the Romanian authorities, as a case of restriction for the freedoms, based on the cited article.

In an analogical way, the thought of the Advocate General was based on the fact that changing the gender of a person also has consequences on the personal status of his family since there is a chain of connection, according to which the civil status documents respect the states that are not burdened with obligations related to the descendants, according to the already existing jurisprudence and particularly the Pancharevo and Coman cases (Kinsch, 2018-2019).

Perhaps the solution is the recognition of the new gender for a person in the civil status documents since they serve to identify the circulation of the person in relation to the identity card, residence permit, imposing at the same time also a change of civil status documents for one's family members.

According to author’s opinion, the issue of changing the civil status of a person who has changed gender is a topic that concerns first of all the person himself and the recognition of family status is a second topic as a consequence and effect that does not exactly enter the personal circle of the person.

Accordingly, the individual, since he is unable to obtain his own change, suffers damage to his personality, to his life and dignity and secondarily to his family status.

An identity card is an official document that concerns a person's daily life. It is not the family status that suffers real discrimination but the person himself as a person who finds himself trapped in a regime that does not allow him to freely perform actions of any kind in the country in which he lives, thus having negative results to a general welfare, leaving the rights of family members and especially children in the background.

The birth certificate comes to the forefront in the argument of the Advocate General, where the appellant presents complaints of two different types, leaving out family life. It is assumed that a response from the Court should follow two different paths, which join the same situation, this of the civil status acts that respect the rules of the Union and of the appellant who wants to oblige the court to obtain an amendment of his identification elements.

According to author's opinion, the positions of the Advocate General appear to be correct and well argued, but it seems that the CJEU cannot adequately respond to the issue of a new name, gender and family status, that affects registration in a civil registry as well as free movement. These are statements that follow a logical process, that addresses the effects before the practice of a situation of recognition of a person's gender change, based on arguments that respect fundamental rights and especially Union law.

The competence of the CJEU is to regulate family relationships and to impose, in the specific case in Romania, the recognition of a gender change that dissolves a previous situation, as also happens in the case of a marriage.

The updating of the birth certificate in the territory of Romania is linked to the restrictive obligation of having performed a marriage in the past in the territory. Thus, it is specified that the marriage celebrated in a different state has the same validity as we have seen in the Coman case.

In a parallel and analogous way the same is also true for filiation certificates. Romania recognizes homosexual parenthood but has doubts about filiation certificates, since they cannot change the new gender identities that are acquired in another country. The majority of Member States of the Union allow gender change, which does not affect the role of mother, father and the birth of children, that are linked to the biological sex of parents and the gender where it was chosen later[18].

According to the ECtHR the updating of the birth certificates of children is linked to the gender identity acquired by the parents, which does not violate the rights guaranteed by the ECHR. A

18TGEU, Trans Rights Map 2024: https://tgeu.org/tgeus-trans-rights-index-map-2024-reveals-polarisation-in-trans-rights-in-europe-and-central-asia/. European Commission: On the implementation PROGRESS REPORT of the LGBTIQ Equality Strategy 2020-2025, 2023: https://commission.europa.eu/system/files/2023-04/JUST_LGBTIQ%20Strategy_Progress%20Report_FINAL_WEB.pdf. European Parliament, European Parliament Resolution of 8 February 2024 on the implementation of the EU LGBTIQ Equality Strategy 2020-2025 (2023/2082(INI)): https://www.europarl.europa.eu/doceo/document/TA-9-2024-0076_EN.html

lack of consensus, for the states in the sector under consideration, is linked to gender changes, the quality that the parent puts ethical discussions and the related reasons for each state that should follow, also a wide margin of appreciation in this sector (Alaattinoğlu, Margaria, 2023)[19].

So we have a division between states that accept transsexual parenthood like Malta, Finland, Sweden, Belgium, etc., where the gender change determines and modifies the acts of filiation with the obligation that recognizes in countries, like Romania, what we saw in the Pancharevo case.

The recognition of a new gender also involves the introduction of a homosexual marriage for countries that do not accept it yet and the forms of filiation conclude the recognition of effects on the civil status and the status of family members.

19ECtHR, sentence of 4 April 2023, case nn. 53568/18 and 54741/18, O.H. and G.H. v. Germany, parr. 114, and case n. 7246/20, A.H. and others v. Germany.

Gender change and national identity

Gender change is connected to the topic of sexual identity but also of the person according to the ECHR. It is a possibility that requires the recognition in a comprehensive way to the sex, the respect of public order and national identity, but also the dignity and personal identity of the person. The motivations as an obstacle to freedom of movement and the reference to abuse of rights of movement for the national law on the status of persons puts in a broad way and affirms the recognition in a legitimate way of the relative circumstances that have to do with citizenship and residence.

The modification of civil status documents and the application of rights of movement, which derive from and have to do with citizenship of the Union, are topics that simultaneously address the consequences of an obligation, which respects national identity and public order for the Member States that are involved, as a solution to a difficult knot to resolve the personal status of rights acquired abroad.

A refusal of recognition after gender change, as a motivation of two levels of justification, is a reality that we must take into account. The first step, concerning the Member State that does not allow changes of status, was made by Bulgaria and Hungary. A second step, concerns the refusal that is motivated and based on the impossibility that recognizes a new status, which corresponds to the procedures that are provided for by the change of sex and the order of the forum of a foreign state that has acquired a new gender. The reasons for refusal of recognition are thus addressed in a different way and with various other arguments that are connected and based on the principles, values of the Union and also on national legislation.

The recognition of a new name and gender that is denied puts in difficulty every democratic state that asks and recognizes the relative right without opposing to public order, national identity the justification that hinders the circulation. The Member State should demand and respect the relative procedures that are provided for in the internal legal system and in gender matters as

a claim that respects the principles of effectiveness relating to the change of a name.

The non-existence of a precise procedure for the change of gender is based on the right of each applicant, that automatically recognizes the personal status and the acquisition abroad and as a consequence the birth certificate of his documents.

The acts of family members are effects of change of sex. The solution and the ideas of the Advocate General in the Miron case overcomes the exceptions relating to national identity in Romania.

Even if this were the case, the relative refusal is opposed by the national legal system, which does not allow the recognition of gender changes even on a constitutional basis. The change of sex in the birth certificate has effects on other acts that are connected to it.

The risk of interfering with a political, constitutional position brings the state to a sphere of operation of rights, where European circulation is limited to the passport, the identity card

and the birth certificate, that is not mentioned. The practices that we have seen in the Pancharevo case are even higher than the present cases under examination (Plan, 2024).

The gender hypothesis, thus, creates among the identification elements a subject that brings the birth certificate to those that are subsequently connected with travel documents but also to those that are not connected with the name and sex. Of course, public order is a valid argument but not restrictive in this case and its use does not find justification on the refusal of recognition of identification documents.

Union law is effective even when it does not change but encourages national law to accept gender change. The limits of Union competence, the battles and respect for human values and dignity, equality for human rights on a diplomatic, political, legal level is a reality that goes beyond the jurisdiction of any court and that finds reason for the needs of a global society.

The Mirin judgment

The Mirin judgment of 4 October 2024 affirmed and considered the fact that the United Kingdom is no longer a Member State of the EU.

The applicant asked the national authorities to recognize changes to his personal status obtained from the United Kingdom before the transitional period provided for by the withdrawal agreement from the EU. His position was based on Articles 20 and 21 TFEU, i.e. being a citizen of a Member State who has exercised his freedom of movement and residence in another Member State[20].

In this regard, the CJEU considered the applicant's argument regarding the withdrawal of the United Kingdom from the EU irrelevant. In matters of the status of persons, the competence of the Member States concerned only the regulation of the change of gender identity and of persons. And all this in respect of the

20CJEU, C-4/23, Mirin, 4 October 2024, ECLI:EU:C:2024:845, published in the electronic Reports of the cases.

law of the Union, and consequently of the right of every citizen to move and reside freely in the various Member States[21].

The refusal by the authorities of a Member State to recognise its own national's name attributed, according to the law, by another Member State who has been transferred and exercises his right of freedom of movement and residence, represents an obstacle to that freedom.

In this way, the person appears to have two different names and this leads to difficulties in living his everyday life. It is created confusion that arises from his own identity[22]. This obstacle and inconvenience arise from the relative refusal of the authority of a Member State to not recognize the change of gender identity that is obtained by its citizen who resides in another Member State.

This situation is opposed to the national legislation that subordinates the modification of obtaining a definitive judicial provision to authorizations[23]. It is a legislation that represents an

21CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 53.

22CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 54.

23CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 55-57.

unjustified restriction based and inspired by Art. 21 TFEU and Art. 45 CFREU[24]. The relative motivation recalls, according to the CJEU, the restrictive legislation from a national point of view and the freedom of movement and residence justified and based on objective considerations of proportionality to the objectives pursued[25]. Requirements that are not ascertained, since the Romanian government has not provided such elements to the judges of the preliminary reference. Therefore, the CJEU has highlighted the legislation considered justified and in accordance with the fundamental rights provided by the CFREU and the right to respect private life[26].

This position just mentioned is also interpreted by the ECtHR and is based on Art. 8 ECHR. These are rights that arise from different causes from the ECtHR regarding the respect for private life, the sexual identity of people, the right of transsexual

24CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 49-50.

25CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 59.

26CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 62.

subjects, personal development, physical and moral integrity, respect for one's sexual identity[27].

Art. 8 ECHR obliged the contracting states to provide in their respective legal systems and procedures the legal recognition of identity and gender in a precise and predictable manner[28]. Within this context, the CJEU has stated that:

> "(...) the procedure provided for by Romanian legislation does not represent an effective means (...) residence in another Member State changes in the first name and gender identity (...) obtaining recognition in one's country of origin (...)"[29].

It is a position that has profitably asserted the freedoms of movement and residence as well as the outcome of proceedings that have placed the discretion of national authorities resulting in the decision, which implies the divergence of names and gender identities that are attributed to one's own citizen.

The CJEU concluded that Articles 20 and 21 TFEU in the light of

27CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 64.

28CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 65-66.

29CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 68-69.

Articles 7 and 45 CFREU are obstructed by the legislation of a Member State, such as Romania, which does not allow, due to the absence of a final provision, the authorisation of the internal judicial authorities, recognising the birth certificate of one of its citizens as well as the changes of the first name and gender identity legally obtained in the Member State to which the person had moved by exercising the freedom of movement and residence[30].

The obligation to recognize personal statuses are legally acquired by citizens in other Member States and within the exercise of their freedoms of movement and residence thus specifying the gender, which defines the identity and status of a person as well as the name, the authorities of the Member States obliged to another Member State and within the exercise of freedoms. The confirmation of the obligation to recognize status is not absolute.

Member states adopt strict internal regulations for the freedoms of movement and residence based on objective considerations,

30CJEU, C-4/23, Mirin, 4 October 2024, op. cit., par. 70-72.

proportionate to the objective pursued in an implicit way, admitted to the national authorities, which refused to recognize personal statuses established in various other Member States, thus, not accepting regulations that meet the relevant requirements.

We have not seen any further clarifications that have limited the referring judge and the Romanian government to offer elements that derive from objectives pursued by the national legislator, such as the legislation in question, recalling that the legislation of a Member State that seeks to prevent a transsexual person from enjoying his or her need to exercise a right protected by the EU is in principle incompatible with the law of the EU[31].

This aspect is based on cases relating to the compatibility of national rules on work, social security and the principle of discrimination against transsexuals[32]. Again the CJEU referred in

31CJEU, C-423/04, Richards, 27 April 2006, ECLI:EU:C:2006:256, I-03585, par. 31.

32CJEU, C-13/94, P/S and Cornwall County Council, 30 April 1996, ECLI:EU:C:1996:170, I-02143. C-117/01, K.B., 7 January 2004,

case C-43/24, Shipov that in this case the preliminary reference concerned another country, namely the Bulgarian, that does not allow the change of gender identity on civil status documents.

In the specific case of a transsexual, who makes use of the law of the Union and especially of the principles of equality and freedom of movement of European citizens.

The CJEU has followed measures that hinder the freedom of movement and residence of its citizens that cannot in any case violate the CFREU. These are principles that highlight the refusal of Member States to recognize a husband of the same sex as a spouse.

In the Mirin case the CJEU did not clarify the obligation to recognise family and personal statuses relating to its scope. Perhaps because it took a position on these aspects in the Coman and Pancharevo judgments. They were the subject of contrasting interpretations given that the Court based its decision on Art. 21 TFEU and the obligation for Member States to recognise the

ECLI:EU:C:2004:7, I-00541. C-451/16, MB, 26 June 2018, ECLI:EU:C:2018:492, published in the electronic Reports of the cases.

acquired family status of their respective citizens in another Member State, which is "oriented" and "functioned" to the exercise of freedoms of movement and residence. It requires each Member State to recognise the relative family relationships that are established by other Member States, i.e. to recognise the family relationships that are established for other Member States thus allowing the family members to exercise the freedoms of movement and residence in the Union, as well as other rights that are derived from and respect the status based on the law of the country in which they are established.

Approaches that are established by the Court according to Art. 21 TFEU. The obligation of each Member State to recognise within its own legal system the legal effects of family ties, which have arisen in another Member State, is related to the members who make up a family and consquently all rights are attributed according to the law of that state.

The Mirin ruling refers to the adherence of the measure that CJEU has reaffirmed for each Member State that is obliged to

recognize the personal status that is acquired by a citizen in another Member State that respects the law of the Union according to Art. 21 TFEU.

This is a statement that implies the obligation of recognition that is not generalized but operates to removes the obstacles of freedom of movement and residence of European citizens. The CJEU has not taken a position on the aspect that also includes the obligation in question, i.e. relating to the consequences of the recognition of the identity generally obtained by the interested party on the civil status documents that concern him and that are different from his birth certificate.

On this point, Advocate General De La Tour in his conclusions had proposed to the Court to adopt two distinct solutions for the name and for gender identity, while the Romanian authorities should have recognized and noted the new first name obtained the Advocate General in paragraphs 90-93 of the CJEU. It was not included in the judgment in the introductory question of the referral proceedings that the appellant requested changes for the

first name, gender identity with a unique way on the birth certificate that does not result from the case documents.

Concluding remarks

The Miron case is an important step towards European integration, that is, for the sector of human rights protection from a general point of view but above all for the matter of circulation of personal and also family statuses within the Union as application of the principles of recognition of a gender identity status to a Member State of the Union.

The preliminary procedure was based on the freedom of movement and residence of fundamental rights, namely personal identity, family law, civil status, registration and related certificates, etc. This is a problematic balance where national legislations prove to be restrictive and rigorous towards the change of civil status documents in relation to gender.

In this regard, even the principle of equality[33] and free movement

33See the preliminary ruling presented on 23 January 2024, case C-43/24, Shipov.

are interpreted so far in a precise manner and do not allow transsexual people to acquire their own registry documents by changing their gender and as a consequence the change of sex and its circulation in their European territory, of the relative citizenship as well as registration in the registry office.

Rightly, the Advocate General de La Tour based himself on the past of the CJEU itself, namely in the Coman and Pancharevo cases and on the actual and affirmed conclusions of these judgments regarding the recognition of the personal and family status of a citizen in another Member State in a functional and partial way. The coordination between legal systems as a source of an obligation for Member States to recognize statuses should also be extended to legal situations that arise on the basis of countries of origin, thus also confirming the need for a change in national legislation.

Infact, the reality is different as can be seen from the modification of a citizen's birth certificate, that indicates gender identity, as well as the competent authorities that limit the

modifications for the issuing of documents and allowing thus the interested party to reside and circulate freely within the Union. On the other hand, the Advocate General does not clarify exactly but simply refers to it in order to convince the status of a couple and a family that can satisfy legal certainty and not hinder freedom of movement to family members.

The limiting effect, of the new gender identity on civil status documents for the interested party in a country, that requests and allows through documents the demonstration of their family ties, that are constituted by the Member State of origin and that thus risks preventing family ties from hindering marriages, filiations in the future, is linked to the rights already recognized by the ECHR and the related jurisprudence such as the right to life, dignity, marriage, family.

We need unreserved recognition where the gender identity and the civil status documents of the interested party and their family members can guarantee a broad protection of these rights in order to be able to talk about rights that are part of the fundamental

rights of man as we have also seen in the Y v. France case of 26 June 2023 from the ECtHR[34] where it was stated that:

> "(…) Art. 8ECHR for the contracting states have the positive obligation to adopt measures that allow the recognition not only of the change of surname or rules, but also of that of gender identity, obtained in another state (…) that the contracting states must guarantee transgender people both the right to have their identity changed in all public documents, and the right to marry, taking into account the gender reassignment obtained (...)" (Marino, Carrascosa González, 2024).

The two Courts must be oriented towards the adoption of a solution that satisfies first of all the applicant and then any future applicant with the same problem in order to protect the fundamental rights involved. The two super partes Courts such as CJEU and ECtHR have helped for years to clarify, specify the recognition of personal statuses and family members acquired from other states as a basis for obligations that respect Art. 21 TFEU and 8 ECHR. These are guarantees for the circulation of the statuses in question that do not yet exist but must, therefore,

34ECtHR, sentence of 26 June 2023, case n. 76888/17, Y v. France.

ensure greater protection of the fundamental rights that are involved in the sector and above all to “convince” the institutions of the Union to legislate on the matter in a binding manner, filling gaps in the past in this matter and also paving the way for greater protection towards the new typologies of family, that have arisen at a global level.

References

Alaattinoğlu, D., Margaria, A. (2023). Trans parents and the gendered law: Critical reflections on the Swedish regulation. *International Journal of Constitutional Law, 21 (2)*, 603-624.

Blanke, H.J., Mangiamelli, S. (2021). *Treaty on the Functioning of the European Union. A commentary.* ed. Springer, Berlin.

Bob, A. (2021). X and Y v Romania: A Partial Solution to an Impossible Dilemma?. *OER Osteuropa Recht, 4,* 422ss.

De Groot, D. (2021). EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obshtina, *[Global Governance Programme], GLOBALCIT, Special Report, 2021/01, (Global Citizenship).* https://cadmus.eui.eu/handle/1814/69731

Dunne, P. (2015). *YY v Turkey*: Infertility as a pre-condition for gender confirmation surgery. *Medical Law Review*, 23 (4), 646-658.

Gonzalez Salzberg, D.A. (2018) An improved protection for the

(mentally ill) trans parent: A queer reading of A.P., Garçon and Nicot v France. *Modern Law Review, 81 (3),* 526-538.

Gonzalez-Salzberg, D.A. (2014). The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/ Gender by the European Court of Human Rights. *American University International Law Review, 29 (4),* 797-829.

Gössl, S. (2016). From Question of Fact to Question of Law to Question of Private International Law: the Question whether a Person is Male, Female or…?. *Journal of Private International Law, 12 (2),* 269ss.

Holroyd, M. (2020, May, 20). Hungary Passes Bill Ending Legal Gender Recognition for Trans Citizens. *Euronews:* https://www.euronews.com/2020/05/20/hungary-passes-bill-ending-legal-gender-recognition-for-trans-citizens

Kinsch, P. (2018-2019). European Courts and the obligation (partially) to recognise foreign same sex marriages. On Orlandi and Coman. *Yearbook of Private International Law, 20,* 47-59.

Kochenov, D., Belavusau, U, (2020). Same-Sex Spouses: More

Free Movement, but What About Marriage? Coman: Case C-673/16, Coman et al. v. Inspectoratul General Pentru Imigrări, Judgement of the Court of Justice (Grand Chamber) of 5 June 2018, EU:C:2018:385 (April 10, 2020). *Common Market Law Review 57(1),* 227–242, 2020.

Marino, S., Carrascosa González, J. (2024). Matrimonios transfronterizos en la Unión Europea: Derecho internacional privado y reconocimiento mutuo. *Cuadernos de Derecho transnacional, 16(1),* 403-422.

Osella, S. (2021). The Court of Justice and Gender Recognition: A Possibility for an Expansive Interpretation?. *Women's Studies International Forum, 81*, 4ss.

Petrova, T. (2023, May, 2). Barring Legal Gender Reassignment in Bulgaria. Rights of Transgender People and Traditional Social Values. *Verfassungsblog:* https://verfassungsblog.de/barring-legal-gender-reassignment-in-bulgaria/

Plan, A.M. (2024, June, 5). Trans Rights and Gender Recognition before the CJEU. Reflections on the AG's Opinion in the Mirin

Case (C-4/23). *Verfassungsblog:* https://verfassungsblog.de/trans-rights-and-legal-gender-recognition/

Villiger, V.E. (2023). *Handbook on the European Convention on Human Rights.* ed. Brill, Bruxelles.